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MIDWAY-SUNSET  
THIRD PHASE AGREEMENT

This Agreement, dated as of May 20, 1992, by and among the Northern California Power Agency, a joint powers agency of the State of California (NCPA) and the members of NCPA which have executed this Agreement (Participant or Participants), is entered into on the basis of the following

RECITALS:

- A. NCPA's Resource Plan shows that it would be economical for NCPA and its members to purchase additional off-peak energy.
- B. NCPA has therefore entered into an agreement, dated \_\_\_\_\_, 1992 (Midway-Sunset Power Purchase Agreement) under which it will purchase such energy from the Midway-Sunset Cogeneration Company (Midway-Sunset), which owns and operates a cogeneration facility in Fellows, California.
- C. NCPA and the Participants wish to enter into this Agreement to provide for the sale by NCPA to, and the purchase by, those Participants of the off-peak energy that Midway-Sunset has agreed to sell to NCPA under the Midway-Sunset Power Purchase Agreement.

NOW THEREFORE, NCPA and the Participants hereby enter into this

AGREEMENT

Section 1. Definitions. The following terms shall, when used in this Agreement, have the following meanings:

EXECUTION COUNTERPART

1.1 "Operating Entity" means a Participant or group of Participants who schedule their combined Participation Percentages as a single entity.

1.2 "Project" means the purchase of power from Midway-Sunset by NCPA under the Midway-Sunset Power Purchase Agreement and any amendments thereto.

1.3 "Participation Percentage" means, with respect to each Participant, the percentage of the total capacity and associated energy of the Project to which such Participant is entitled pursuant to the terms of this Agreement. The Participation Percentage for each Participant shall be the percentage set forth opposite the name of such Participant in Appendix A hereto, as such Appendix A may be amended from time to time in accordance with this Agreement.

1.4 "Participant" means an NCPA member which has executed this Agreement and a Participant's successor in interest.

1.5 "Midway-Sunset Power Purchase Agreement" means the agreement between NCPA and Midway-Sunset referred to in the second recital hereinabove.

Section 2. Purpose. The purpose of this Agreement is to provide for the sale by NCPA and the purchase by the Participants of the energy purchased by NCPA under the Midway-Sunset Power Purchase Agreement, to authorize NCPA as agent for the Participants to engage in activities related to that basic purpose and to specify the rights and obligations of NCPA and of the Participants with respect to the Project.

Section 3. NCPA Sale and Delivery of Project Power to Participants.

3.1 NCPA will sell to each Participant, and each Participant will purchase from NCPA, Project Off Peak Net Energy, as that term is defined in

the Midway-Sunset Power Purchase Agreement, equal to the product of the Participation Percentage of that Participant and the total Off-Peak Net Energy purchased by NCPA under that Agreement. Each Participant may also, at its option, elect to purchase from NCPA a portion of the additional energy that NCPA is entitled to purchase from Midway-Sunset under section 9.4 of the Midway-Sunset Power Purchase Agreement equal to the product of the Participation Percentage of that Participant and the total additional energy NCPA is entitled to purchase under section 9.4.

### 3.2 Scheduling and Delivery.

3.2.1 NCPA shall advise each Operating Entity at the times prescribed in the service schedules appended hereto what Midway-Sunset's incremental cost of energy will be during the following day. Each Operating Entity shall, prior to the times prescribed in those service schedules, schedule Off-Peak Net Energy equal to the total of the Participation Percentages of the Participants for which it is scheduling and such of the additional energy referred to in section 3.1 as those Participants are entitled to, and elect to, purchase. The schedule shall be firm thereafter unless changed by mutual agreement between the dispatchers or schedulers of Midway-Sunset, NCPA, and the Operating Entity. Each Operating Entity shall notify NCPA of all schedule changes. Upon agreement for the transfer of energy between Participants, pursuant to section 8 of this Agreement, one Operating Entity may schedule the energy of the Participant or group of Participants of another Operating Entity, up to the combined Participation Percentages of the transferor and transferee Participants.

3.2.2 Deliveries shall be made at the Point of Delivery specified in the Midway-Sunset Power Purchase Agreement. Deliveries shall be deemed to be made during the hours and in the amounts so scheduled; provided that if scheduled deliveries are interrupted or curtailed as the result of a transmission curtailment, or a Force Majeure or Forced Outage as defined in section 13 of the Midway-Sunset Power Purchase Agreement, schedules of such energy shall be reduced in proportion to the amounts scheduled by each

Operating Entity to reflect the actual amounts of energy delivered; provided that if the interruption or curtailment lasts for more than 24 hours the reduction shall be in proportion to the Participation Percentages of the Participants.

Section 4. Related NCPA Activities. NCPA may engage in other activities intended to enable the Participants to utilize the Midway-Sunset Power Purchase Agreement as efficiently and economically as possible. NCPA shall exercise the authority granted to it by this section in accordance with the provisions of section 10 of this Agreement.

Section 5. Rates and Charges for Project Power. The rates and charges that each Participant will pay NCPA for capacity and associated energy supplied under this Agreement shall be sufficient to permit NCPA to recover all costs, expenses and obligations related to the Project. Those rates and charges shall incorporate the rates and charges that NCPA is obligated to pay to Midway-Sunset for the energy supplied by Midway-Sunset under the Midway-Sunset Power Purchase Agreement, and shall also be sufficient to reimburse NCPA for transmission losses and charges for transmission services if such reimbursement is appropriate.

Section 6. Budget and Billing Statements.

6.1 Prior to the beginning of each NCPA fiscal year for which no budget has been adopted, the NCPA Commission will adopt a budget for such fiscal year or years for costs and expenses relating to the Project. The NCPA Commission may adopt budgets for more than one fiscal year. The budget shall include the following two categories of costs and expenses: (a) the charges that NCPA estimates that it will be obligated to pay to Midway-Sunset for Project power, and (b) all other costs and expenses reasonably related to the Project. NCPA shall promptly give notice to each Participant of its projected share of each of those two categories of costs and expenses.

6.2 Monthly billing statements prepared by NCPA shall be sent to each Participant showing the Participant's share of costs and other charges payable pursuant to this Agreement for each billing period. Such statements shall separately set forth any credit or debit adjustments.

6.3 Amounts shown on each billing statement are due and payable thirty (30) days after the date of the billing statement except that any amount due on a Friday, holiday or weekend may be paid on the closest following workday.

6.4 Any amount due and not paid by a Participant shall bear interest from the due date until paid at the annual rate established by the Commission of NCPA at the time of adoption of the then most recent budget. If a Participant questions or disputes the correctness of any billing statement by NCPA, it shall pay NCPA the amount claimed when due and shall within thirty (30) days of the receipt of such billing statement request an explanation from NCPA. If the bill is determined to be incorrect, NCPA will issue a corrected bill and refund any amount which may be due the Participant which refund shall bear interest from the date NCPA received payment until the date of the refund at an annual rate to be established by the Commission of NCPA at the time of adoption of the then most recent annual budget. If NCPA and the Participant fail to agree on the correctness of a bill within thirty (30) days after the Participant has requested an explanation, the parties shall promptly submit the dispute to arbitration under section 1280 *et seq.* of the California Code of Civil Procedure.

#### Section 7. Obligations in the Event of Default.

7.1 Upon failure of any Participant to make any payment in full when due under this Agreement, NCPA shall make written demand upon such Participant, and if payment is not made within 30 days from the date of such demand, the failure to make payment shall constitute a default.

7.2 Upon the default of any Participant, NCPA (a) may terminate the provisions of this Agreement insofar as the Agreement entitles the defaulting Participant to its Participation Percentage of Project energy, and (b) shall use its best efforts to sell and transfer for the Participant's account all or a portion of the Participant's Participation Percentage of Project energy. When making such sales and transfers NCPA shall allow all Participants and then other NCPA member entities the same rights of first refusal that are provided for in section 8 of this Agreement. Notwithstanding such sale, transfer or termination, the obligations of the defaulting Participant under this Agreement shall continue in full force and effect except that such obligations shall be discharged to the extent that NCPA receives payment from a purchaser or transferee of the defaulting Participant's Participation Percentage in Project energy.

7.3 Upon the default of any Participant, and except as transfers are made pursuant to section 8, (i) the Participation Percentage of each nondefaulting Participant shall be automatically increased for the remaining term of this Agreement pro rata with those of the other nondefaulting Participants, and (ii) the defaulting Participant's Participation Percentage in the output of the Project energy shall (but only for purposes of computing the respective Participation Percentages of the nondefaulting Participants) be reduced correspondingly. The fact that other Participants have increased their obligations to NCPA according to this section shall not relieve the defaulting Participant of its liability under this Agreement, and any Participant increasing its obligation shall have a right of recovery from the defaulting Participant to the extent of its increase in obligation.

Section 8. Transfers of Rights by Participants. Each Participant has the right to make transfers, sales, assignments and exchanges (collectively "transfers") of Project energy and rights thereto upon ninety days advance written notice to NCPA or such lesser period of notice as NCPA may be able to accept. If the proposed transfer is to an entity that is not a Participant, all Participants must be given the right of first refusal in proportion to their Participation Percentages. If the proposed transfer is to an entity that is not a

member of NCPA, all NCPA members shall have the right of first refusal in proportion to the amounts those members contribute to the NCPA general fund. NCPA shall, if requested to do so by a Participant, use its best efforts to assist that Participant in making such transfers of Project energy on behalf of the Participant. No transfer shall relieve a Participant of any of its obligations under this Agreement except to the extent that NCPA receives payment of these obligations from a transferee.

Section 9. Withdrawal by Participants. No Participant may withdraw from this Agreement. However, NCPA will use its best efforts to assist any Participant that wishes to transfer all or any portion of its rights pursuant to section 8 above.

Section 10. NCPA Governance of the Project.

10.1 Commission Meetings. Actions of the NCPA Commission relating to this Agreement or to the Project shall be taken at regular or special meetings of the NCPA Commission but shall be participated in only by those Commissioners, or their designated alternates, who represent Participants.

10.2 Quorum. A quorum at NCPA Commission meetings for purposes of acting upon matters relating to this Agreement or to the Project shall consist of Commissioners, or their designated Alternates, representing at least two Participants having a combined majority in interest based on Participation Percentages.

10.3 Voting. Voting by representatives of Participants on matters relating to this Agreement or to the Project shall be on a one member/one vote basis, with a majority vote required for action; however, upon request of any Participant representative, the voting on an issue shall be by Participation Percentage with a 65% or more favorable vote necessary to carry the action. The 65% required by the preceding sentence shall be reduced by the amount that the Participation Percentage of any Participant exceeds 35%, but shall not be reduced below a majority in interest.



10.4. Review of Voting. Any decision related to this Agreement or to the Project taken by the affirmative vote of Participants holding Participation Percentages of less than 65% can be reviewed and revised if a Participant gives notice of intention to seek such review and revision to each of the other Participants within ten days after receiving written notice of such action. If such notice of intention to seek review is given, any action taken specified in the notice shall be nullified unless the authorized representatives of Participants holding at least 65% of the total Participation Percentages vote in favor thereof at a regular or specially called meeting of the NCPA Commission. The 65% required by the preceding sentence shall be reduced by the amount that the Participation Percentage of any Participant exceeds 35%, but shall not be reduced below a majority in interest.

Section 10. Voting on Termination of the Midway-Sunset Power Purchase Agreement. Section 3 of the Midway-Sunset Power Purchase Agreement provides that the Agreement shall continue to be in effect for each even and odd two year period subsequent to 1995 unless a notice to terminate is issued by either Party by April 15 of any even year beginning in 1994. Accordingly, on or before March 15 of each even numbered year beginning in 1994, representatives of the Participants shall vote at a Commission meeting as to whether a notice to terminate the Midway-Sunset Power Purchase Agreement shall be issued before April 15 of that year. Notwithstanding any other provision of this Agreement, such a notice shall be issued unless (a) the representatives of the Participants unanimously vote not to issue the notice of termination, or (b) on or before April 15 of that year the rights of all Participants who have voted to issue the notice of termination are transferred, pursuant to Section 8 of this Agreement, to entities that have agreed to assume the obligations of those Participants.

Section 11. Term and Termination. This Agreement shall not take effect until it has been executed and delivered to NCPA by Participants the Participation Percentages of which, in the aggregate, equal at least 83%. The NCPA members listed on Appendix A shall have 45 days following written

notice of the effective date to execute and deliver counterparts of this Agreement to NCPA. If any NCPA member listed on Appendix A fails to execute and deliver this Agreement within such 45 days, unless otherwise provided by the Participants, the Participating Percentages of such member or members shall be spread among the Participants in proportion to their Participation Percentages. The term of this Agreement shall continue until the expiration of the Midway-Sunset Power Purchase Agreement. This Agreement shall not be subject to termination prior to the expiration of its term by any party under any circumstances, whether based upon the default of any other party under this Agreement or otherwise, except as specifically provided herein.

Section 12. Member Service Agreement. This Agreement is a service schedule and a third phase agreement and shall be deemed incorporated into the Member Service Agreement that each Participant has executed or successor agreement to the Member Service Agreement. This Agreement shall be construed as constituting the more specific terms governing the general relationship between the parties set out in that Member Service Agreement.

Section 13. Several Obligation. No Participant shall be liable under this Agreement for the obligations of any other Participant, except as provided in section 7 of this Agreement. Each Participant shall be solely responsible and liable for performance of its obligations under this Agreement and for the maintenance and operation of its respective properties. The obligation of each Participant to make payments under this Agreement is a several obligation and not a joint obligation with those of the other Participants, except as provided in section 7 of this Agreement.

Section 14. Amendments. This Agreement may be amended only by a written instrument executed by NCPA and the Participants or their successors with the same formality as this Agreement.

Section 15. Severability. In the event that any of the terms, covenants or conditions of this Agreement shall be held invalid, NCPA and the Participants intend that all other terms, covenants and conditions and their application shall not be affected thereby, but shall remain in force and effect unless a court holds that such provisions are not severable from all other provisions of this Agreement.

Section 16. Governing Law. This Agreement shall be interpreted, governed by and construed under the laws of the State of California.

Section 17. Counterparts. This Agreement may be executed in several counterparts, all or any of which shall be regarded for all purposes as one original and shall constitute and be but one and the same instrument.

Section 18. Headings. The headings to the sections in this Agreement are intended for convenience only and not for the purpose of interpreting the provisions of this Agreement.

Section 19. Notices. Any notice, demand or request required or authorized by this Agreement to be given to any Participant or to NCPA shall be given in writing and shall either be personally delivered to the Participant or transmitted to the Participant by regular mail at the address designated by the Participant. The designation of such address may be changed at any time by written notice.

Section 20. No Waivers. No waiver of performance under this Agreement shall be effective unless given by the Commission. Any such waiver by the Commission in any particular instance shall not be deemed a waiver with respect to any subsequent performance.

Section 21. Warranty of Authority. Each Participant which has executed and delivered this Agreement represents and warrants that it has agreed to be bound by all of the terms, covenants and conditions of this

Agreement and has acted with all of the requisite capacity and authority and the approval of its governing body.

IN WITNESS WHEREOF, each Participant has by the signature of its duly authorized representatives shown below, executed and delivered a counterpart of this Agreement.

NORTHERN CALIFORNIA  
POWER AGENCY

By: \_\_\_\_\_

Date: \_\_\_\_\_

CITY OF HEALDSBURG

By: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

CITY OF LOMPOC

By: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

CITY OF ALAMEDA

By: \_\_\_\_\_

Date: \_\_\_\_\_

CITY OF LODI

By: Thomas A. Peterson  
Thomas A. Peterson, City Manager

By: Alice M. Reimche  
Alice M. Reimche, City Clerk

Approved as to form 5/20/92  
Bob McNatt 5/28/92  
City Attorney

CITY OF ROSEVILLE

By: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

CITY OF UKIAH

By: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

APPENDIX A

MIDWAY-SUNSET  
THIRD PHASE AGREEMENT

PARTICIPATION PERCENTAGES

Alameda	26.677%
Healdsburg	2.367%
Lodi	31.389%
Lompoc	2.667%
Roseville	33.867%
Ukiah	<u>3.033%</u>
	100.000%

EXECUTION COUNTERPART